Supreme Court, U.S.
FILED
DEC 23 1992
OFFICE OF THE CLERK

No. 92-744

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

KRAFT, INC.,

Petitioner,

—v.—

FEDERAL TRADE COMMISSION,

Respondent.

IN SUPPORT OF PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF THE AMERICAN ASSOCIATION OF ADVERTISING AGENCIES, INC., THE AMERICAN ADVERTISING FEDERATION AND THE ASSOCIATION OF NATIONAL ADVERTISERS, INC., AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF *CERTIORARI*

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INTEREST OF THE *AMICI CURIAE*

Amici curiae are associations whose members commission, create, and place the

vast majority of the nation's regional and national advertising.[1]

The American Association of Advertising Agencies, Inc. ("A.A.A.A."), is the national trade association of the advertising agency business, representing approximately 700 advertising agencies located throughout the United States. Members of the A.A.A.A. create virtually all national advertising placed by advertising agencies, as well as a significant amount of local and regional advertising. Most clients of A.A.A.A. member agencies are businesses selling goods and services to the public. Advertising agencies, along with their advertiser clients, are subject to the

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[1] Petitioner and respondent have consented to the filing of this amicus brief. Their letters of consent are being lodged with the Clerk.

regulatory jurisdiction of the Federal Trade Commission ("FTC" or "Commission"), and thus have a special interest in Commission practices that restrict commercial speech.

The American Advertising Federation ("A.A.F.") is a national trade association that represents virtually all elements of the advertising industry. Among A.A.F.'s members are companies that manufacture and advertise consumer products, advertising agencies, magazine and newspaper publishers, radio and television broadcasters, outdoor advertising organizations, and other media. A.A.F. members also include 21 national trade associations, more than 200 local professional advertising associations with 52,000 members, and more than 200 college chapters, with more

than 6,000 student members. A.A.F. members use almost all forms of media to advertise and communicate with consumers throughout the United States.

The Association of National Advertisers, Inc. ("A.N.A."), the advertising industry's oldest trade association, is the only organization exclusively dedicated to enhancing the ability of businesses to advertise on a national and regional basis. With more than 2,000 subsidiaries, divisions and operating units, A.N.A. members market a kaleidoscopic array of goods and services and account for almost 80% of the nation's annual national and regional advertising expenditures. As the nation's principal community of commercial speakers, A.N.A. has long been committed to the advancement of

commercial speech designed to permit consumers to make informed and autonomous choices in the marketplace.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici represent thousands of advertising agencies, advertisers, and others who participate in the advertising industry. From this broad-based, national perspective, amici are well-situated to explain the substantial and deleterious impact that the FTC's decision will have. Amici submit that the practical consequences of the FTC's decision will greatly impede both the business of advertising and the ability of consumers to receive useful commercial information.

The Constitution requires that appellate courts conduct an independent review of the evidence in the record when

a trier of fact has concluded that certain speech is not protected by the First Amendment and that the speaker therefore is subject to sanction. This principle is fully applicable to cases involving commercial speech. The decision below disregards this clear command, and so creates a constitutionally impermissible risk that some valuable, protected speech will be punished, as well as a risk that even more protected speech will be suppressed through self-censorship resulting from fear of erroneous punishment.

The Commission's decision that it need not consider extrinsic evidence will make it virtually impossible to predict when the Commission will find that any particular advertisement contains an implied misleading message. The decision

therefore creates intolerable uncertainty for members of the advertising community. Unable to determine whether any informative advertisement will subject them to liability, advertisers and those working with them will be forced to rely on advertisements that present the lowest possible "risk." Such advertisements will typically be those that present the fewest "hard" facts, and consumers thereby will be deprived of much useful and valuable information.

Amici agree with and support fully Kraft's arguments regarding the erroneous standard of review applied by the Seventh Circuit. This brief will focus on the severe impact that the FTC's approach -- which the Seventh Circuit approved -- will have on the advertising community and on consumers.

ARGUMENT

I. APPELLATE COURTS MUST REVIEW DE NOVO FTC DECISIONS STRIPPING ADVERTISEMENTS OF FIRST AMENDMENT PROTECTION

The principles clearly expressed in Bose Corp. v. Consumers Union, 466 U.S. 485 (1984), and applied to commercial speech by six Members of this Court in Peel v. Attorney Registration and Disciplinary Comm'n of Illinois, 496 U.S. 91 (1990), govern review of FTC determinations that advertisements are untrue and therefore not protected by the First Amendment. Bose's holding -- that when the trier of fact in a defamation case finds "actual malice," the appellate court must independently determine whether the evidence supports that determination, 466 U.S. at 511 -- rested on the need "to be sure that the speech in question actually falls within [an]

unprotected category [of speech] and to confine the perimeters of any unprotected category within acceptably narrow limits." Id. at 505.

That need is as great here as it was in Bose. Truthful advertising, like the product review at issue in Bose, informs consumers about the qualities of the advertised product, and (often) about how it compares with other products, thereby facilitating informed decision-making and furthering the consumer's "quest for truth." Bose, 466 U.S. at 503.

Nothing in Bose provides grounds for the Seventh Circuit's refusal to apply de novo review to the FTC's restriction on commercial speech. In fact, the opinion points in precisely the opposite direction, stating that "the rationale for [viewing false and misleading speech

as an unprotected category of speech] would be essentially the same as that involved in the libel area." Id. at 504 n.22. (The question whether speech fell into "the libel area" was, of course, the very question that Bose held subject to de novo review.) That is no doubt why, in Peel, six Justices of this Court either expressly stated that de novo review was required, or conducted, albeit without citing Bose, an independent review of the record. See Peel, 496 U.S. at 108 (plurality op.); id. at 111-15 (Marshall, J., concurring in the judgment); id. at 118 (White, J., dissenting). The Seventh Circuit's application of the "substantial evidence" standard disregards the teaching of Bose and Peel.

That the initial trier of fact is the FTC, as opposed to a federal or state

court, cannot change the constitutional requirement announced in Bose. As we discuss in Point II, below, the FTC's "expertise," whatever it may encompass, does not extend to determinations about how reasonable consumers will perceive any implied messages in an advertisement. See generally Pitofsky, Beyond Nader: Consumer Protection and the Regulation of Advertising, 90 Harv. L. Rev. 661, 678 (1977). Even assuming that the FTC has meaningful expertise in such matters, moreover, that fact provides no basis on which to distinguish Bose. "The requirement of independent appellate review . . . is a rule of federal constitutional law. . . . . It reflects a deeply held conviction that judges . . . must exercise such review in order to preserve the precious liberties

established and ordained by the Constitution." Bose, 466 U.S. at 510. The identity of the trier of fact, or its relative expertise, cannot alter this constitutional requirement.

Indeed, Bose rejected the "clearly-erroneous" standard of Federal Rule of Civil Procedure 52(a), 466 U.S. at 514, which, like the "substantial evidence" standard applied by the Court of Appeals here, is a "deferential" standard of review premised on the comparative advantage that the trier of fact enjoys over the appellate court in resolving certain issues. See Fed. R. Civ. P. 52 and Adv. Comm. Note thereto. Even assuming the FTC enjoys such an advantage on the issue of implied meaning, the point of Bose is that the advantage is insufficient to outweigh the

risk posed by a deferential standard of review -- that "[p]roviding triers of fact with [only] a general description of the type of communication whose content is unworthy of protection [will] not . . . serve[] sufficiently to narrow the [unprotected] category." 466 U.S. at 505.[2] That is why "[j]udges, as expositors of the Constitution, must

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[2] The Seventh Circuit's observation that Bose and Peel "involved review of court decisions, and courts generally lack the Commission's expertise in the field of deceptive advertising" (Pet. App. 8a), misses the point. Those cases did review "court decisions," but the issues decided, and reviewed, were issues as much within the fields of the lower courts' expertise as false advertising is within the Commission's. Compare Bose, 466 U.S. at 574 (decision about "actual malice," i.e. existence of intent or reckless disregard) with Pullman-Standard v. Swint, 456 U.S. 273, 287-90 (1982) (decision about "discriminatory intent" or "actual motive"; clearly erroneous standard of Rule 52(a) held applicable).

independently" review the record, id. at 511, and why the Constitution does not permit extending deference to the FTC's findings on matters of this sort.

II. THE FTC SHOULD NOT BE PERMITTED TO DETERMINE THAT AN ADVERTISEMENT IS IMPLICITLY MISLEADING WITHOUT CONSIDERING EXTRINSIC EVIDENCE

The court of appeals decision leaves advertisers with little means of predicting whether the Commission later will determine that a particular advertisement is misleading. Even if extensive testing of advertisements on actual consumers shows that an advertisement does not convey a message that misleads, the Commission could reach the contrary conclusion based solely on the reaction of the individual Commissioners to the advertisement. The FTC's legal standard thus places advertisers under an intolerable risk of

being second-guessed and sanctioned by the Commission. The advertising community's inevitable reaction to the Commission's approach will be to shy away from advertisements that convey hard information, depriving consumers of data that would greatly assist them in making purchasing decisions.

Amici emphasize that their members have no desire to mislead the public, and have strong incentives to avoid doing so. An FTC determination that an advertisement is misleading not only carries legal sanctions; it also can damage the reputations of the advertiser, its agency and all those connected with the advertisement. See, e.g., Horovitz, Volvo, Agency Fined $150,000 Each For TV Ad, L.A. Times, Aug. 22, 1991, at D2 (noting that the determination

"represent[ed] a major embarrassment to" both the manufacturer and the agency involved). Significantly, this damage will occur, and cannot be ameliorated, even if the FTC's determination is incorrect.

A. The FTC's Rejection of Extrinsic Evidence Creates Intolerable Uncertainty.

The FTC believes that it can conclusively determine the implied meaning of an advertisement simply by reading the advertisement itself, without any resort to, or consideration of, available extrinsic evidence of the advertisement's meaning. This rule ignores the fact that "implied meaning" by definition is not self-evident, and the fact that the Commission, acting alone, is not particularly well-suited to determine what implied messages consumers will perceive in an advertisement.

"[T]he correct implication" of a given communication "will vary depending on the background knowledge and the informational needs of the speaker and listener." Craswell, Interpreting Deceptive Advertising, 65 B.U. L. Rev. 658, 717 (1985). Advertisements, of course, have many listeners. Those listeners encounter advertisements in a variety of situations; the different types of "copy-tests" used by the advertising community are designed to replicate, as best as possible, those situations, so that the reactions of actual consumers may be predicted. See Comment, The Use and Reliability of Survey Evidence in Deceptive Advertising Cases, 62 Or. L. Rev. 561, 584-85 (1983).

The FTC, by contrast, is neither an objective judge of such consumer

reactions nor a good substitute for them. The context in which a statement is made and heard is crucial to understanding the meaning, especially the implied meaning, of any remark. Craswell, 65 B.U. L. Rev. at 716-17. Yet, the Commissioners are likely to encounter a challenged advertisement first as the subject of a complaint. In that context, not only are they alerted to look for any possibly misleading implied meaning, but they are told by FTC enforcement staff precisely which implied meaning to look for. Not surprisingly, they often find it. Their discovery, under the circumstances, has relatively little probative value for the question they purport to be answering -- whether consumers, acting reasonably under the circumstances they are in, would think that the advertisement

contained such a message (see Pet. App. 38a). Consumers do not view an advertisement in a vacuum, and certainly not after having been told that it contains a misleading implication. Not only are the Commissioners institutionally predisposed to perceive implied messages, but their training and background are such that they are likely to "discover" implied messages that lay consumers would not recognize. FTC Commissioners are frequently "highly trained attorneys with very specialized views of advertising, [who] lack the perspective to accurately identify the meaning given to an advertisement by the general public." Comment, 62 Or. L. Rev. at 572 (citation omitted). They are therefore quite likely to "read into" an

advertisement messages unlikely to be perceived by a member of the public at large.

The defect in the FTC's "no extrinsic evidence" rule is not simply that it is a poor means of ascertaining whether an ad is misleading. The Commission's approach is also inherently unpredictable. In contrast to the rules applied by courts interpreting the Lanham Act (see Pet. 20-25) -- advertisers will have no way to determine in advance whether or not a proposed advertisement will be sanctionable.

It is common practice among national advertisers to copy-test an ad prior to dissemination by showing it to real consumers under realistic circumstances and discovering what messages, express or implied, the consumers take from the

advertisement. This permits advertisers to be as certain as they can be that consumers do in fact understand the message intended to be communicated, and also gives the advertisers the opportunity to determine that the advertisement presents no misleading messages and leaves no false impressions.

Prior to the FTC's decision in this case, this process of copy-testing also gave advertisers some measure of legal security: having ascertained that the public was not, in fact, being misled, they could run the advertisement confident that the FTC would consider the results of the copy-tests in any later proceeding. If the FTC claimed that the advertisement was likely to mislead some portion of the public, advertisers could refute that claim by introducing the

results of copy-tests showing that real consumers did not, in fact, see the implied messages "perceived" by the FTC.

If this Court denies review in this case, however, the Commission will be free to ignore such empirical data, and rely solely own its own "intuitive . . . hunch." Gellhorn, Proof of Consumer Deception Before the Federal Trade Commission, 17 Kan. L. Rev. 559, 565 (1969). Advertisers will be unable to rely on their empirical data showing that, in the real world, the advertisement did not mislead the public. Without the ability to rely on extrinsic evidence, advertisers must create and make decisions about advertisements based on little more than their predictions about how this small group of individual Commissioners, operating in artificial

circumstances, will react. Such a regime guarantees uncertainty, and that uncertainty will inevitably have drastic consequences for both the advertising community and the public.

B. The Uncertainty Created By The FTC's Decision Harms Both Advertisers And Consumers.

The uncertainty created by the FTC's "no extrinsic evidence" rule will have a very significant effect on the advertising community. Without an ability to predict, with reasonable accuracy, whether an informational advertisement will be deemed misleading by the Commissioners, advertisers will have a clear incentive to produce only fluff.

Under the standard followed by the FTC in this proceeding, even advertisements tested and found not to

mislead consumers may subject both the business that makes the advertised product, and all who assist in its advertising, to liability if three Commissioners decide for themselves (and by themselves) that the advertisement is somehow misleading. Advertisers therefore must live with the considerable risk that they will be subject to the possibility of burdensome injunctive orders and substantial fines if the Commission, based solely on its own reading, finds an advertisement misleading.

That uninviting prospect will lead to advertisements that are as "risk-free" as possible. Unable to predict the Commissioners' views, and unable to rely on their own consumer copy tests, businesses will avoid making statements

in any advertisements that could possibly be interpreted as containing an implied false assertion. "[O]ne response to such uncertainty is to encourage conservative copywriters to make a variety of corrective disclosures. On the other hand, an equally likely response is to discourage advertisers from providing certain types of information concerning the product . . . ." Schmidt & Burns, Proof or Consequences: False Advertising and the Doctrine of Commercial Speech, 56 U. Cin. L. Rev. 1273, 1281 (1988). To do so, of course, advertisers may have to strip their advertisements of much substantive content. "Some companies . . . are hesitating to make even legitimate . . . claims for fear of prompting federal . . . investigations." Landler, Schiller & Smart, Suddenly,

Green Marketers Are Seeing Red Flags, Bus. Wk., Feb. 25, 1991, at 74. See also id. ("until the regulatory chaos is cleared up, marketers are not likely to do much" "selling" or "telling" about the environmental attributes of their products).

When members of the advertising community adopt this approach, manufacturers of superior products lose the ability to present the facts establishing their superiority, thereby reducing product differentiation and injuring competition. As this Court has stated:

> So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.

Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976). Clearly, the FTC's adoption of a rule that chokes off the flow of useful information injures not only the advertising community, but consumers as well.

If advertisers shift from providing factual information to running advertisements presenting only "'soft' information (often called 'puffing') and lifestyle-type campaigns," the resulting advertisements will "provide little assistance to consumers in purchasing decisions." Schmidt & Burns, supra, at 1293. As Judge Manion stated in his concurrence, this Court "has recognized that a free flow of information is indispensable to decisionmaking in the

free enterprise system . . . [and] the FTC jeopardizes this flow." Pet. App. 27a (citation omitted).

C. The FTC's Own Comments Underscore The Scope And Importance Of This Issue.

In a speech delivered shortly after the Commission decided this case, Chairman Steiger emphasized both the importance of the ruling and the fact that it would serve as a blueprint for the FTC's future activities. See Janet D. Steiger, Chairman, FTC, Remarks Before the American Advertising Fed'n Gov't Relations Conf. (Mar. 12, 1991). Chairman Steiger, characterizing the case as "important," id. at 4, and "[o]f particular significance," id. at 2, stated that the FTC's opinion "is a clear statement of the Commission's approach to evaluating implied claims," which she

noted is "the central question of many advertising cases." Id. at 4. Similarly, in a recent article, Commissioner Dennis Yao of the FTC discussed at length the "important issue" whether extrinsic evidence should be received in implied false message cases. Yao & Van Anh Vecchi, Information and Decisionmaking at the Federal Trade Commission, 11 J. Pub. Pol'y & Marketing, Fall 1992, at 1. Commissioner Yao's discussion of Commission policy and practice in such cases focussed heavily on the FTC's opinion in this proceeding. See id. at 2-3.[3]

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[3] The import of the case has not gone unnoticed by the press. See, e.g., Kent, The "Kraft" Case: Symbol of FTC Activity, N.Y. L.J., June 21, 1991, at 3; Landler, Schiller & Smart, Bus. Wk., Feb. 25, 1991, at 74.

The advertising community, which amici represent, is extremely troubled by the FTC's ruling and deeply concerned about the impact that that decision will have on the business of advertising. Amici must work within the regime the FTC creates. The present rule of Kraft makes it nearly impossible to predict when the Commission will deem an advertisement to contain an implied message, and therefore will lead advertisers to shun informational advertisements and favor "puff" messages instead. The resulting drop in useful information will harm not only the advertising community, but the very consumers in whose interest the Commission purports to act.

CONCLUSION

For the reasons set forth above, the A.A.A.A., A.A.F. and A.N.A. respectfully request that this Court grant the

petition for a writ of certiorari to review the Seventh Circuit's decision.

Dated: New York, New York
December 23, 1992

Respectfully submitted,

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